No. 95-227

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ALLIANCE FOR COMMUNITY MEDIA, ALLIANCE FOR COMMUNICATIONS DEMOCRACY, PEOPLE FOR THE AMERICAN WAY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF
[illegible] COUNCIL, AND
[illegible] CENTER
[illegible] AND FAMILIES
[illegible] ALLIANCE
IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

I. Did the 1984 and 1992 Cable Acts create an indirect government subsidy for access channel programmers, so that Section 10 provisions are constitutional without regard to state action?

II. Is "Indecency" a proper standard to apply in the cable television medium, and is channeling indecent material to adult access channels constitutionally permissible?

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INTEREST OF THE *AMICI CURIAE*[*]

Family Research Council, Inc. is a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens. The issues in this case directly affect the ability of families to protect their children, as well as the coarsening media culture with which families must cope. Family Research Council, Inc. works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harms patently offensive media to families.

National Law Center for Children and Families is a non-profit legal organization dedicated to the protection of children and the preservation of families through enforcement of existing laws across the nation and the promulgation of new legislation against illegal pornography and sexual exploitation. The National Law Center actively participates in assisting courts, prosecutors, investigators, legislators, public officials, researchers, and parents to stop illegal pornography and its concomitant harms of sexual exploitation of children, women, and families.

The Family Research Council and the National Law Center have submitted numerous briefs to this Court on pornography and the First Amendment.

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[*] This brief is submitted with the written consent of the parties, filed with the clerk of this Court.

STATEMENT OF THE CASE

Sections 10(a) and 10(c) of the 1992 Cable Act do not amount to state action. Should the Court find state action, however, the analysis of Section 10's constitutionality should continue under the government subsidy doctrine. The access channel scheme is, in effect, a selective government subsidy. Congress' enactment of the access channel directives in 1984 to facilitate the participation of access programmers in the cable industry created the indirect subsidy.

The Constitution does not require Congress to promote or subsidize indecent programs on access channels. Because Section 10 does not deprive potential access channel programmers from airing indecent programs on non-subsidized channels, Section 10 is fully constitutional.

Under any analysis, the standard of indecency is entirely appropriate for evaluating the manner in which material is presented on cable television.

SUMMARY OF THE ARGUMENT

Section One

This case involves Congress' decision to place conditions on the use of cable access channels. *Amici* join Respondents in refuting Petitioners' argument that Section 10(a) and 10(c) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act") result in impermissible state action. Should this Court find state action, however, a government subsidy analysis will preserve the statute's constitutionality.

Cable programmers who choose to use access channels are participating in a form of government subsidy.

Congress chose to subsidize access programmers in the Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779, 47 U.S.C. 521 ("1984 Cable Act") by compelling a hostile, vertically-integrated cable industry to provide access channels at below-market rates. The 1992 Cable Act further reduced access channel programmers' business expenses, thereby enhancing subsidy benefits to the programmers.

Congress may decide whether and the manner in which indecent speech is presented in its access subsidy program when the ability of potential access programmers to speak indecently outside of the subsidy program is not affected. Section 10 neither coerces programmers into using access channels nor requires access programmers to refrain from communicating indecent speech when using non-access channels.

Moreover, Section 10's access channel requirements constitute appropriate means of implementing Congress' policy decision to subsidize only access programs which do not express their ideas in a patently offensive manner. The Constitution does not require Congress to promote or subsidize indecent speech.

Congress created the access channel system to promote diversity of programming in cable television -- a legitimate and important governmental interest. Section 10 of the 1992 Cable Act directly and substantially advances that interest by ensuring that access channels transmit speech of a type which is not otherwise widely available on non-access cable channels, such as local government proceedings or community events. Indecent speech is widely available on non-access cable channels.

Section Two

The standard of "indecency" is a constitutionally valid and publicly known standard that is properly and reasonably applicable to cable television expression. The problem of indecency easily-accessible and pervasive on cable television warrants the government's attempt to regulate it. The framework in Section 10(b) restricts the transmission of indecent programs to children or unconsenting adults, as to which programmers have no constitutional right. Indeed, channeling indecent speech to an adult access channel could increase the avenues and access to communications of an indecent nature, rather than restrict or restrain consenting adults in this regard.

LAW AND ARGUMENT

Section One

I. THE ACCESS CHANNEL SCHEME IS AN INDIRECT GOVERNMENT SUBSIDY.

A. Sections 10(a) and 10(c) of the 1992 Cable Act Do Not Result in State Action; However, Should This Court Find State Action, a Government Subsidy Analysis Will Preserve the Statute's Constitutionality.

Amici join Respondents in urging this Court to sustain the lower court's ruling that Sections 10(a) and 10(c) of the 1992 Cable Act do not amount to state action. Should the Court find state action, however, the 1992 Cable Act may be construed as a non-coercive selective subsidy. If the 1992 Cable Act provides an indirect subsidy to access channel

programmers, the provisions of Section 10 are constitutional. A finding of state action should not, therefore, end this Court's inquiry. "Every reasonable construction [of a challenged statute] must be used to save [it] from unconstitutionality." *Edward J. DeBartolo v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

B. The 1984 Cable Act and the 1992 Cable Act Create an Indirect Selective Subsidy for Access Channel Programmers.

1. Subsidies Occur When Government Confers Economic Benefits Upon Private Parties.

Subsidies occur when government confers economic benefits upon private parties when it is not constitutionally required to do so. *Commissioner v. Sullivan*, 356 U.S. 27, 28 (1958) (describing subsidies as a "matter of grace" that Congress can disallow as it chooses); *cf. DeShaney v. Winnebago County Dep't. of Social Serv's.*, 489 U.S. 189, 196 (1989) (finding that government has no duty to furnish aid even where such aid is necessary "to secure life, liberty, or property interests").

Subsidies may take the form of direct monetary grants or, as in this case, indirect non-monetary benefits which facilitate market participation. In *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1982), this Court *unanimously* recognized the existence of indirect subsidies. In *Regan*, the Court upheld a tax exemption available only to military veterans' lobbying organizations as a permissible indirect subsidy, even though no public funds were transferred to the beneficiaries. Thus, the Court in *Regan* employed an "effects" test for indirect subsidies. *See Grove*

City College v. Bell, 465 U.S. 555, 565 (1984) (noting that the economic effect of an indirect subsidy is "often indistinguishable" from the economic effect of a direct case grant). That is, where government confers economic benefits in order to advance perceived societal interests, government has created an indirect subsidy over which it has significant control. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (holding that, where information is obtained through state-created pre-trial discovery process, the state may curtail the use of such information); *DKT Memorial Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 290 (D.C. Cir. 1989) (recognizing existence of *Regan*'s "effects" test); M. Yudof, *When Government Speaks* 234, 236 (1983); *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (classifying public property as subsidy for expressive conduct).[1]

In *Federal Election Comm'n v. Int'l Funding Inst.*, 969 F.2d 1110, 1113-15 (D.C. Cir. 1992) (en banc), the Court of Appeals for the D.C. Circuit held that access by one political action committee to the donor lists of a rival political action committee, disclosed pursuant to a federal mandate, operated as an indirect subsidy. Consequently, relying on *Regan*, the Court of Appeals sustained the challenged disclosure law because of its subsidy-like effect. 969 F.2d at 1113-14. In so doing, this Court observed that,

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[1] The Supreme Court's Establishment Clause jurisprudence, though flawed in finding that indirect subsidy breaches Establishment Clause prohibitions, directly supports *Regan*'s definition of subsidy. In *Meek v. Pettinger*, 421 U.S. 349, 365-66 (1975), for example, the Supreme Court concluded that a statute which provided teaching material and equipment to sectarian schools amounted to a subsidy for religious education. Similarly, in *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 395 (1985), the Supreme Court considered a statute which provided publicly-salaried teachers as well as instructional material to sectarian schools to be a subsidy. The Court in Ball explicitly relied on the effect of the statute -- relieving sectarian schools of business expenses -- to determine that government had provided a subsidy. *Id.*

prior to the enactment of the federal law requiring disclosure of contributor lists, political action committees had to "obtain [a rival] committee's permission, perhaps at a price" in order to view contributor lists. *Id.* at 1113. Importantly, *Federal Election Comm'n* explicitly applied *Regan*'s "effects" test for indirect subsidies. *Id.*; *see DKT Memorial Fund* at 286.

2. Congress' Enactment of the Access Channel Directives in 1984 to Facilitate the Participation of Access Programmers in the Cable Industry Created an Indirect Subsidy.

After making detailed legislative findings, Congress determined in 1984 that cable system operators had exercised their considerable market power to exclude local and independent programmers from the cable industry. *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 30, 48 (1984); Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779, 47 U.S.C. 521 *et seq.* ("1984 Cable Act"). The FCC had previously attempted to remedy this by creating access channels, but these efforts were soundly rejected as *ultra vires* by the Supreme Court. *See Midwest Video v. FCC*, 440 U.S. 689 (1979). In order to promote diverse programming on cable television, Congress legislatively required that access channels be included in cable systems. *See* 47 U.S.C. §§ 531(a) & 531(b)(1).[2] This history reveals a simple truth: access channels would not, as a practical matter, exist absent the 1984 legislation, and access

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[2] That local franchising authorities had, prior to 1984, attempted to create PEG-like access channels does not diminish the subsidy effect of the 1984 Cable Act with respect to PEG access channels. That is, PEG programmers are in fact the beneficiaries of the Congressional largess. *See Midwest Video*, 440 U.S. at 708-09 (striking down attempt to create PEG-like access channels).

programmers are thus beneficiaries. *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984) (describing access channels as providing access to independent programmers "who generally have not had access to the electronic media").

Given this history, the 1984 Cable Act easily satisfies *Regan*'s "effects" test. *See Regan*, 461 U.S. at 544; *Federal Election Comm'n*, 969 F.2d at 1113. Prior to Congressional intervention in 1984, local government and community programmers, for instance, were generally unable to use the cable television forum because the cable market excluded them. The 1984 Cable Act thus had the effect of assisting independent and local programmers by providing an otherwise unachievable market opportunity and by eliminating or reducing a business expense. This amounts to a subsidy for constitutional purposes. *C.f. Meek*, 421 U.S. at 366; *Ball*, 473 U.S. at 395. The economic value of this subsidy was approximately equal to the amount of money which would have been required for these independent programmers to have purchased a cable channel at the then-prevailing market rate. Congress could have chosen to provide direct cash grants to potential access programmers, but even this direct assistance would not have been as beneficial -- cable system operators could have refused to permit them to purchase channel space, even if they could afford to pay market rates. *See* S. Rep. No. 92, 102d Cong., 1st Sess. 31 (1991); *see also In re Competition, Rate Deregulation, and the Comm'n's Policies Relating to the Provision of Cable Television Serv., Report*, 5 F.C.C.R. 4962, 5050.

19 U.S.C. § 1675 provides further support for the notion that the 1984 Cable Act created a subsidy. Section 1675 defines subsidy in the parlance of international trade. Under Section 1675, a subsidy occurs where (1) government provides economic benefits (2) to a specific class of recipients (3) to further domestic social or political

objectives. *Cabot Corp. v. United States*, 620 F. Supp. 722, 730-32 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986), *vacated in part*, 12 Ct. Int'l Trade 664 (1988). The 1984 Cable Act would qualify as a subsidy for access programmers because it removed economic barriers to participation in cable systems to promote diversity of cable programming and access programmers constitute a discrete, identifiable class of subsidy recipients.

3. The 1992 Cable Act Enhanced the Access Channel Subsidy Program.

In 1992, Congress revisited, and refined, the subsidy it had provided to access programmers in 1984. Responding to the fact that the rates that cable system operators charged access programmers for leased access channel use were unreasonable and discriminatory, Congress gave the FCC the power to establish reasonable rates. *See* 1992 Cable Act at §12; *see also In re Competition*, 5 F.C.C.R. at 5050-51 (requesting that Congress empower the FCC to resolve disputes over the rates charged to access programmers).

Price control mechanisms of the sort effected by Section 12 of the 1992 Cable Act are indisputably a species of subsidy. *See Yakus v. United States*, 321 U.S. 414 (1944); *Bowles v. Willingham*, 321 U.S. 503 (1944). The 1992 Cable Act thus enhances the access subsidy by significantly reducing yet another of access programmers' business expenses. That is, it has the effect of further facilitating access programmer participation in cable systems.

II. THE CONSTITUTION DOES NOT REQUIRE CONGRESS TO PROMOTE OR SUBSIDIZE INDECENT PROGRAMS ON ACCESS CHANNELS.

When the government subsidizes expressive activity, it has the prerogative to regulate the activity pursuant to its legitimate policies. This latitude is wide, but not boundless.[3]

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[3] Regulation of speech in a subsidy context is not subject to strict scrutiny. In *Federal Election Comm'n*, this Court held that regulatory and statutory schemes which selectively facilitate expressive activity, such as Section 10 and its implementing regulations, are not subject to strict scrutiny. 969 F.2d at 1116. In fact, the Court in *Federal Election Comm'n* observed that *Regan* and *Rust* applied a mere rational relationship test. *Id.* The Court stated that other cases appear to have applied intermediate scrutiny. *Id.*

In addition, the "forum analysis" doctrine does not apply to Section 10 or the access channel subsidy. In *Rust*, the Supreme Court suggested in dicta that, although the setting aside of publicly-owned property operates as a subsidy, government may be less able to attach speech-related conditions on the use of such subsidies. The Supreme Court's "forum analysis" jurisprudence demonstrates that none of the forum exceptions to *Rust* apply to Section 10.

In *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1982), the Supreme Court extensively discussed "forum analysis" and set forth a comprehensive classificatory scheme for various public and non-public fora. The most salient feature of each of the three types of fora discussed in *Perry*, and the only characteristic common to all three, is that they involved speech on government-owned property. *Id.*; *see Kokinda*, 497 U.S. at 726. According to *Perry*'s tripartite framework, with traditional public fora, legal title vests in the government while equitable title vests in the undifferentiated public at large. In limited public fora, by contrast, government opens its own property for speech while in non-public fora, government has declined to so open its property. *See Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2154 (1993) (limiting forum analysis to "public property"); *see also Greer v. Spock*, 424 U.S. 828, 833 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974).

In *Rust v. Sullivan*, this Court applied the well-established principle that Congress may constitutionally subsidize some speech, but not other, related speech. 500 U.S. at 194. In *Rust*, for instance, the Supreme Court upheld an indirect subsidy which discriminated in favor of speech about childbirth and against speech about abortion. 500 U.S. at 186. *See Lyng v. International Union*, 485 U.S. 360 (1988). The *Rust* regulations prohibited doctors who accepted a federal subsidy from using the subsidy funds to advise pregnant women to obtain abortions. 500 U.S. at 186. The Court in *Rust* sustained the challenged regulations because they permitted subsidy recipients to counsel pregnant women regarding abortion services provided they do so with private resources. *See id.* at 196 (stating, "[t]he Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities"); *see Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding limits imposed on political candidates who choose to accept public funds); *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984). By contrast, in *Board of*

In *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), the Supreme Court reiterated that "forum analysis [is used] as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.* at 800. (Emphasis added.) Similarly, in *Kokinda*, the Court noted that, unlike private proprietors who enjoy "absolute freedom" from first amendment constraints, government as proprietor does not have unfettered freedom to selectively open its property for speech. 497 U.S. at 723-24. The private property/public property distinction is thus a crucial part of "forum analysis."

Access channels are neither owned nor operated by Congress or any branch of government. All that Congress has done is mandate the availability of access channels. Section 10 is thus not subject to any "public forum" exceptions.

Trustees of Stanford Univ. v. Sullivan, 773 F. Supp. 472 (D.D.C. 1991), conditions on a federal subsidy were stricken because recipients were compelled to forfeit all rights to speak on certain subjects to participate in the subsidy.

Importantly, the *Rust* regulations were based directly on the context or viewpoint of the speech. Here, it is not the content which is at issue, but the manner in which the content is conveyed.[4] In *FCC v. Pacifica Foundation*, 438 U.S. 726, 743 n.18 (1978), the Supreme Court observed that indecency regulations primarily affect the form, rather than the content, of serious communication: "There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *See Barnes v. Glen Theatre*, 501 U.S. 560, 579 (1991) (upholding ban on nude dancing because "[t]he requirement that the dancers wear pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it is simply makes it less graphic"). Thus, Petitioners and other access programmers are not foreclosed from expressing highly controversial opinions on access channels -- they are simply obliged to express them without using patently offensive language.

Section 10's regulations reflect the long-established governmental policy favoring speech of a certain form -- that which is not patently offensive or harmful to children -- but such regulations have no effect on the ability of potential access programmers to communicate in an indecent manner outside of the subsidy program.[5] If access programmers

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[4] In *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S.Ct. 2510 (1995), however, viewpoint discrimination in violation of the stated parameters of a limited public forum could not be saved using a subsidy analysis. Nevertheless, in the present case, no viewpoint discrimination of any sort is present. *See Pacifica*, 438 U.S. 726.

[5] The present case is similar to *Rust* in another important respect. In both instances, government chose to attach new conditions to an existing subsidy program. *Rust* teaches that government necessarily has the

elect to take advantage of the subsidy-generated access channels, all that they must do is refrain from transmitting messages in an indecent manner.

The Supreme Court has applied this rule to the subsidization of other constitutional rights. In *Harris v. McRae*, 448 U.S. 297, 315 (1980), and *Maher v. Roe*, 432 U.S. 464, 474 (1977), for example, this Court upheld government decisions not to subsidize abortions for indigent women, despite the fact that childbirth and other "related" medical procedures were subsidized. In *Maher*, the Court observed that states could refuse to subsidize abortions while subsidizing childbirth so long as the government does not place unconstitutional restrictions on women seeking abortions in [non-government-subsidy] situations. 432 U.S. at 466. *Maher* established that a right to abortion implies no limitation on the authority of the government to make a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of public funds. *Id. See Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (sustaining total ban on use of public facilities or personnel for abortion-related services as not burdening privacy rights).

Invalidating Section 10, or the regulations implementing it, would have the ridiculous consequence of forcing Congress, against its will, to subsidize pornography. The Court of Appeals *in banc* got it right in stating, "[w]hatever may be said in support of indecent programming on access channels, Congress surely does not have to promote it."[6] Surely, the Constitution does not require

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power to do this, so long as the subsidy recipients are not thereby coerced into forfeiting constitutional rights. 500 U.S. at 195-97; *see United States v. Kokinda*, 497 U.S. 720, 731-32 (1990). The enhanced access subsidy easily satisfies that requirement.

[6] *Alliance for Community Media v. F.C.C.*, 56 F.3d 105, 123 (D.C. Cir. 1995).

government-sponsored nude talk shows. Section 10 relieves Congress from this absurd "promotional role."

Section 10 simply represents Congress' non-coercive decision to refrain from promoting or subsidizing indecent, patently offensive speech. It is thus facially non-violative of the first amendment.

The decision to subsidize only that speech which is not communicated in an indecent manner is also constitutional in effect. The fact that some access programmers may not be financially capable of transmitting indecent speech on non-subsidized cable television is irrelevant for constitutional purposes. In the words of a unanimous Supreme Court: "although government may not place obstacles in the path of a [person's] exercises of ... freedom of [speech], it need not remove those obstacles not of its own making." *Regan*, 461 U.S. at 549 (quoting *Harris*, 448 U.S. at 316). In *Federal Election Comm'n*, the Court noted that the restrictions that the Federal Election Campaign Act[7] placed on access to contributor lists did not infringe on the first amendment rights of defendants because the Act merely left "undisturbed a pre-existing barrier." 969 F.2d at 1113. Similarly, Section 10's provisions do not infringe on the first amendment rights of programmers of indecent cable shows because they erect no new barrier to such access programmers' speech.[8]

In addition, the government's important and legitimate interest is in promoting *diverse* programming on

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[7] 2 U.S.C. § 438 *et seq.*

[8] Congress' failure to subsidize the full gambit of access programmers' speech cannot amount *ipso facto* to an abridgment of the speech not subsidized. That proposition has been soundly and consistently rejected. *See, e.g., Regan*, 461 U.S. at 549-51. To require Congress to subsidize all speech or none would have the practical result of no government subsidy for any speech, an outcome for which Petitioners would apparently be loathe to argue.

cable television. *Midwest Video v. FCC*, 440 U.S. at 699; *cf. T.V. Communications Network, Inc. v. Turner Network Television*, 964 F.2d 1022, 1024, 1026 (10th Cir. 1992). Indecent programming is widely available on non-access cable.[9] Congress correctly concluded that the access channel subsidy program need not support indecent cablecasts to promote "diverse" cable fare. *See* H.R. Rep. No. 934 at 30.

Section 10, and the regulations implementing Section 10, directly and substantially advance the government's interest in promoting diversity on cable television. It follows, then, that neither Section 10, nor the regulations promulgated thereunder, are arbitrary or unreasonable.

Section Two

I. INDECENCY IS A PROPER STANDARD FOR THE CABLE MEDIUM.

The central question presented in this case is whether cable operators can refuse indecent programming on their unblocked public, educational, and governmental ("PEG") access channels and (to protect non-consenting adults, children, and themselves) to allow indecency only on a blocked channel accessible only to adults.

The answer is affirmative for two reasons. The first is that the standard of "indecency" is a constitutionally valid and publicly known standard that is properly and reasonably applicable to cable TV expression. The second is that channeling indecent speech to an adult access channel would increase the avenues and access to adult nature

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[9] Petitioners conceded to the court below, in their Joint Brief of Petitioners at 42 n.28, that sexually explicit, indecent programming will continue to be available on non-access cable channels notwithstanding Section 10, and cited several examples to illustrate the point.

communications, rather than restrict or restrain consenting adults in this regard.

The federal statutes and regulations involved in this controversy are valid and enforceable, therefore, because they are narrowly tailored and rationally related to solving a problem of surpassing importance for both governments and parents, the protection of children from harmful and offensive "adult" communications.

Prohibitions on the public dissemination of both obscene and indecent material under Title 18, U.S.C. § 1464, have been part of American life since 1934 and are well known to the public and the operators of mass communications media facilities. Just as everyone is presumed to know the law (and the law is presumed to reflect what everyone knows), adults in America know from their sense of common decency and from their universal experience with radio and television what types of words and nudity are "indecent" in such mass communications forums. Such a practical and common sense of judgment as to public expression has made broadcast television and radio accessible to all who tune in, whether selectively or incidentally. No one need avoid the public media for fear of being offended by repetitive four-letter sexual "slang" words or pornographic nudity and parents need not shield from nor deprive their children of the programming that is openly available and displayed to the general public. Indeed, courts could take judicial notice that cable television reaches more people in this last part of the century than there were radios in 1934 or than there were television sets when the Federal Communications Commission first applied the indecency standard to the broadcast networks in the middle of this century.

As we enter the next century, the importance and pervasiveness of cable television and other technologies will grow. Cable, satellite, and phone-assisted audio-visual systems, including the "Internet" for computers, will dictate

that such mass media facilities be available to the entire public, young and old, rich and poor, urban and rural. Like radio and broadcast TV before it, cable TV is and will increasingly be a major factor in the ability of our citizens to know, learn, and be part of society here and around the world. Cable TV is too important a part of the public's right to know for it to be made "off limits" to children because of patently offensive pornography on access and other "basic cable" channels. The indecency standard can protect the public and children from the most offensive material; consenting adults can still avail themselves of the desire for such pornography in other places, including commercial stores, mail order, restricted dial-porn, pay-per-view and premium video channels, adults-only stores and services, and now, pursuant to 47 U.S.C. § 532(j) and 47 C.F.R. § 76.701, adult access cable channels.

Indecency as a governing standard is the functional equivalent of the second prong of the "*Miller* Test" on patent offensiveness.[10] The difference is not in the manner of its application, but upon the types of acts or words to which it can be applied and the contexts in which it is applied. The obscenity test was stated to apply to "hard-core sexual conduct" of the types given as "*Miller* Examples",[11] whereas the indecency test is applied to sex and nudity in mass communications when amounting to "patently offensive references to excretory and sexual organs and activities."[12] It

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[10] *Miller v. California*, 413 U.S. 15, at 24 (1973); *Smith v. California*, 431 U.S. 291, 300-02 (1977).

[11] *Miller*, 413 U.S. at 25: "patently offensive representations of ultimate sexual acts, normal or perverted, actual or simulated . . . masturbation, excretory functions, and lewd exhibitions of the genitals".

[12] *Pacifica*, 438 U.S. at 743; *Public Notice: New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Red. 2726 (April 27, 1987).

is the purpose to be served by each standard that distinguishes the scope and breadth of their applications.

The obscenity test is designed to provide "concrete guidelines to isolate 'hard-core' pornography from expression protected by the First Amendment." *Miller*, 413 U.S. at 29.[13] Because obscenity is unprotected in all streams of commerce and public access, its patently offensive representations of sexual conduct and genital exposure must also be designed to appeal to a prurient interest[14] and lack serious literary, artistic, political, and scientific value,[15] as a matter of law and fact. Applying the indecency standard does not require proof of prurience or lack of value, as in obscenity, since "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality" and "'indecency' as a shorthand term for 'patent offensiveness'. . . [is] a usage strikingly similar to the Commission's definition in this case." *FCC v. Pacifica Foundation*, 438 U.S. at 740, n. 15. Indecency should and does include more than totally unprotected obscenity. This is so because indecency governs

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[13] *See also*: B. Taylor, "Hard-Core Pornography: A Proposal For A *Per Se* Rule", 21 U. Mich. J.L. Ref. 255 (1988).

[14] Prurience refers to the commercially exploited erotic or lustful qualities of a work, *Roth v. United States*, 354 U.S. 476, 487, n. 20 (1957); *Mishkin v. New York*, 383 U.S. 502, 508-10 (1966); *Cohen v. California*, 403 U.S. 15, 20 (1971); *Miller v. California*, 413 U.S. at 18, n. 2, rather than serious sexual treatment that provokes "only normal, healthy sexual desires", *Brockett v. Spokane Arcades*, 472 U.S. 491, 496, 498, n. 8 (1985). See also *Polykoff v. Collins*, 816 F.2d 1326, 1335-36 (9th Cir. 1987); *United States v. Guglielmi*, 819 F.2d 451, 454-55 (4th Cir. 1987); *Ripplinger v. Collins*, 868 F.2d 1043, 1051-54 (9th Cir. 1987). It is the evidence of commercial or public "pandering" to this prurience that distinguishes obscene "hard-core" pornography from protected fine art and literature that may be sexually explicit. See *Ginzburg v. United States*, 383 U.S. 463, 466-67, 471-74 (1966); *Hamling v. United States*, 418 U.S. 87, 127-29 (1974); *Splawn v. California*, 431 U.S. 595, 598 (1977); *Pinkus v. United States*, 436 U.S. 293, 303-04 (1977).

[15] *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

what is openly and generally broadcast and instantly available over mass communications media to every American, adults and minors, consenting and unconsenting, literate and illiterate, religious or not, sensitive or not. It is the difference between what can be commercially or publicly available even to otherwise "consenting adults", which does not include the obscene, as opposed to what can be openly and publicly available to all adults and children over mass media, which does not include the indecent, that separates the purposes served by the two standards.

Indecency is an inherently variable standard that accounts for the time, place, manner, and context in which it is exhibited for a determination in a specific setting whether a particular program is "indecent" or not in those circumstances. No "safe harbor" is even needed, since what may be indecent at three o'clock in the afternoon may not be indecent at three o'clock in the middle of the night.[16] This Court mandated such variable "nuisance rationale" application of the indecency standard in *Pacifica*, 438 U.S. at 750, when it held:

> The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and

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[16] It cannot be said, if it ever could, that there are few children watching television, whether broadcasting or cable brings it into their homes, during late night hours. *See* news article referencing figures from Turner Entertainment Networks (cable system) that "about 3.5 million children ages 2 to 11 -- more than 9 percent of youngsters that age -- were watching shows between 11 p.m. and midnight." "Good Night! Children Staying Up Even Later: Bedtime Becomes Another Story As Parents' Days Stretch Out", *Washington Post*, February 4, 1995, page A-1.

differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

People do not have to "turn away" or tune out or forego use of broadcast media in their homes, as they may in other optionally available settings outside the home. *Pacifica*, 438 U.S. at 749 n. 27. In recognizing that cable TV's basic channel tiers are legally analogous to airwave broadcast methods of receiving general TV programming in the home, thus justifying the application of the indecency standard and providing for segregation of indecent material onto a protected adult access channel, this Court should rely on and apply the same reasons for having recognized the right of the Congress and FCC to prohibit indecency on airwave TV. The Government's interest is not just in the protection of children from indecent material that may be harmful to them. The Government has a legitimate interest in the channeling or prohibition of all indecent material, harmful or not, merely because it is too offensive for general audiences of adults and children alike. As stated in *Pacifica*, the reasons for distinguishing a mass media technology like radio or TV from stores, theaters, and other commercial retail settings, is two fold and includes both the rights of the adult public as well as the juvenile public (not just the child public as so often argued[17]):

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[17] Opinions, like that of the Court of Appeals in *Action for Children's Television v. FCC*, 11 F.3d 170, at 174-76 (D.C. Cir. 1993) ("ACT III"), that deny the first reason given in *Pacifica* to allow for public decency and morality of adults, as well as children, are clearly erroneous and should be corrected by this Court. Just as the "safe harbor rule" of the FCC to suspend indecency enforcement after certain times in the evening is purely a creature of prosecutorial discretion and not a mandate of Congress or an element of Section 1464, the application of the indecency standard solely to protect children is a lower court rule that was first applied by the FCC and later imposed on it by the courts, in contravention of the statute and the holding of this Court in *Pacifica*. See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("ACT I"); *Action for*

> The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.
>
> Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Booksellers and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in

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Children's Television v. FCC, 932 F.2d 1504, 1510 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913, 112 S.Ct. 1281, 117 L.Ed.2d 507 (1992) ("ACT II"); *Action for Children's Television v. FCC*, 11 F.3d at 183 ("ACT III").

> *Ginsberg* ... that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. ... The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.[18]

This Court should recognize what everyone knows, and what the cable industry itself has worked so hard to accomplish in the home market, that cable TV has "established a uniquely pervasive presence in the lives of all Americans" and is "uniquely accessible to children, even those too young to read." There is no legal or common sense justification to distinguish the governmental and public interest in a basic cable tier that is free from patently offensive sex and nudity and "dirty words." All that was said above by this Court in *Pacifica* applies to the cable channels instantly available to all the millions of homes that subscribe to cable. Their rights to be left alone, to protect their children, to avoid being slapped in the face by indecent scenes of erotic or offensive nudity and sex, are just as real when they receive their television feeds by wire instead of by antenna. This law only applies to the basic, public access channels. It does not prevent, and specifically provides for, adult access to adult material on an adult channel.

Indecent speech and pictures, which by their legal nature consist of patently offensive representations of "sexual or excretory activities or organs", may have some First Amendment protection for consenting adults, *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989), but the Constitution does not require that minors have a right to receive or disseminate indecency nor that adults have

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[18] 438 U.S. at 748-50 (citations omitted).

any right to communicate indecently to or in the presence of minors. Indecency is unprotected speech as to minors and therefore, adults can be required to restrict such speech to other, consenting, adults.

Putting adult indecency onto a separate channel or tier is analogous to the blinder rack, behind the counter, opaque cover, etc., restrictions of state "display laws" for "adult" magazines that may not be obscene but could be "harmful to minors",[19] and to the credit card, access code, scrambling-blocking devices used to segregate indecent dial-porn from access by minors.[20] This Court approved of the FCC's dial-porn technical screening devices in *Sable*, at 128-30, because "these rules represented a 'feasible and effective' way to serve the Government's compelling interest in protecting children", at least all but "the most enterprising and disobedient young people." No less is required or involved herein, where an adult cable subscriber can give a credit card or proof of age when obtaining cable service and then be given an access code or adult "PIN" number to use whenever the adults desire to watch the scrambled "adult access channel" on the basic cable tier. This protects children when they surf through the basic

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[19] *See American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990); *American Booksellers Ass'n. v. Com. of Virginia*, 882 F.2d 125 (4th Cir. 1989) on remand from 488 U.S. 905 (1988); *Upper Midwest Booksellers Ass'n. v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983); *Cinecom Theatres v. City of Fort Wayne*, 473 F.2d 1297 (7th Cir. 1973); *American Booksellers Ass'n. v. Rendell*, 481 A.2d 919 (Pa. Super. 1984); *Capitol News Co. v. Metro. Gov't.*, 562 S.W.2d 430 (Tenn. 1978).

[20] *See Information Providers' Coalition v. FCC*, 928 F.2d 866, 872 (9th Cir. 1991); *Dial Information Services Corp. of New York v. Thornburgh*, 938 F.2d 1535, 1537, 1541 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 557 (2d Cir. 1988), *cert. denied*, 488 U.S. 924 (1988) ("*Carlin* III"). See also *Enforcement of Prohibitions on the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Red. 2714, 2719 (1987) (FCC dial-a-porn regulations on limiting indecency to adults by technical means).

channels with the remote control from being assaulted by sex and nudity on an adult channel, but allows easy and private access by adults to such programming at any time of the day or night. This is no more than having an adult ask a cashier to sell him a "soft-core porn" magazine in a convenience store, having an adult give a credit card or PIN number to purchase indecent dial-porn messages or conversations, or having all adults refrain from seeing indecent messages on roadside billboards or drive-in movie screens and having them obtain such indecent or harmful to minors pornography in adults only settings. The cable restrictions under consideration in this case are, therefore, consistent with existing law and commercial practice in all other facets of American life and present no restraint on protected speech for adults that is either unreasonable or overly restrictive for adult access to non-obscene materials.

This Court recognized in *Pacifica* the right of the Government and the FCC to restrict indecent programming from the public broadcast technologies of network TV and radio. The public airwaves are required to be kept "decent" enough for all to enjoy, without intrusive assault on moral sensibilities. This makes TV and radio accessible and available to every one and denies no one of the right or ability to participate in national and world communications. This applies as equally today with cable television (as well as telephone services and other public media technologies) as it does and did with radio and broadcast television in years past. Cable TV is "cast" as broadly across the country as network TV and is invited into the home to deliver decent basic cable programming for all, including the public and children who do not desire or need indecent material. The availability of non-obscene indecency on cable (via premium movie or pay-per-view channels, or an adult PEG channel) allows for cable to supply such material to consenting adults while avoiding unwanted or inadvertent exposure to other adults and minor

children. To the extent basic cable channels are instantly available to all who subscribe to basic cable services as the means to receive broadcast and general programming, it is broadly cast as much as network TV and public airwave radio. The same interests recognized in *Pacifica* should be applied here. To the extent cable systems can also deliver limited access "adult" materials to consenting adults, such added access to what may be indecent can be provided under controlled access means to those adults who knowingly invite such programming. Therefore, this system could increase adult access to sexually "frank" material that may be indecent to the public and children. By doing so, operators can provide a forum that is open 24 hours every day to any and all adults who choose to participate or observe.

CONCLUSION

The decision of the Court below should be affirmed.

Respectfully submitted,

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